BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WAYNE E. CORNWELL, II	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,027,685
	)	& 1,028,442[1]
DEFFENBAUGH INDUSTRIES	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 29, 2008, Award entered by Administrative Law Judge Steven J. Howard. The Workers Compensation Board heard oral argument on January 21, 2009.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Clifford K. Stubbs of Roeland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

[1] Docket No. 1,028,442 involves a date of accident of September 3, 2004, for an alleged right lower extremity injury. The parties did not purport to litigate that accident date. Docket No. 1,028,442 was not decided by the Judge in the October 29, 2008, Award. Therefore, it appears that docket number was inadvertently added to the caption in respondent's application for review and, therefore, the appeal in that claim should be dismissed.

ISSUES

Docket No. 1,027,685 is a claim for bilateral shoulder injuries that allegedly resulted from a series of repetitive traumas. In the October 29, 2008, Award, Judge Howard granted claimant permanent disability benefits for a 10 percent right upper extremity impairment and a 5 percent left upper extremity impairment. The Judge determined the date of accident was February 2, 2006, the day before claimant underwent right shoulder surgery.

Respondent contends this claim should be denied. It asserts the evidence suggests claimant did not sustain an injury to his shoulders that arose out of and in the course of his employment. Respondent maintains Dr. Edward J. Prostic's (claimant's medical expert) opinions relating claimant's shoulder injuries to work are based on inaccurate information and that the testimony of Dr. Lowry Jones, Jr., (the court-appointed physician) suggests claimant's injuries are not related to work. Respondent also contends claimant did not provide notice until March 2, 2006, and, therefore, notice of accident was not timely under K.S.A. 44-520 as claimant's accidental injury actually occurred in either 2002 or 2005 when claimant first became aware his condition or symptoms were related to work.

Claimant requests the Board to affirm the Award. Claimant contends the medical evidence is uncontradicted that his work caused his bilateral shoulder injuries. In addition, claimant argues February 2, 2006, is the appropriate date of accident for the repetitive trauma injuries to his shoulders as that is the date his surgeon (whom claimant contends became an *authorized* physician by reason of respondent's failure to provide medical treatment) took him off work before the right shoulder surgery. Finally, claimant argues he provided respondent timely notice of his bilateral shoulder injuries in January 2006 when he told Thomas Steck (respondent's workers compensation administrator) his shoulder symptoms were related to work.

The issues before the Board on this appeal are:

1. Did claimant injure his shoulders as the result of a series of repetitive traumas that arose out of and in the course of his employment with respondent?

2. If so, what is the appropriate date of accident under K.S.A. 2005 Supp. 44-508(d)?

3. Did claimant provide respondent with timely notice of his accidental injury as required by K.S.A. 44-520?

The parties do not challenge the Judge's findings regarding the amount of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

At the time of the August 2008 regular hearing, claimant was 36 years old and had worked for respondent since August 1999 as a driver in the roll-off department.[2] Claimant continues to perform that job in which he delivers and picks up large steel trash containers and dumpsters, some as large as 22 feet long, 8 feet wide, and up to 9 feet tall. The containers have heavy steel doors, which claimant will push open and close a total of 10 to 16 times throughout the day. Those doors, which weigh hundreds of pounds, rust at their hinges. And as the rust grows, the doors become progressively more difficult to open and close. Claimant estimates driving and "unhooking boxes or getting things situated with customers" comprises 80 to 85 percent of his time at work.[3]

When claimant began working for respondent in 1999 he had no problems or complaints concerning his shoulders. Claimant, who is from 6'2" to 6'3" tall and weighs from 175 to 192 pounds, began experiencing pain in the back of his shoulders in 2002. Claimant testified, in part:

> Q. (Mr. Stubbs) When did your shoulders start hurting?
>
> A. (Claimant) Back in '02.
>
> . . . .
>
> Q. How did you first notice it, were you closing a door, were you doing something in particular, was it the end of the day you just noticed they were sore, what brought it on?
>
> A. I noticed it more -- I would pull over like on the side of the highway, take like a power nap and I would put my arms up on the steering wheel for a pillow and when I would bring my arms down, that is when I started noticing it.
>
> Q. What type of symptoms would you notice?

[2] This was the second time claimant had worked for respondent. The first time claimant worked for respondent was from August 1996 until January 1999.

[3] Cornwell Depo. at 37, 38.

A. Just pain in the backside of my shoulders.[4]

Claimant also experienced increased shoulder symptoms when he washed out containers with a fire hose. And on windy days, pushing the container doors exacerbated claimant's shoulder pain. But despite his shoulder symptoms, claimant continued working.

In June 2005, before he began attributing his symptoms to work,[5] claimant sought medical treatment from his family doctor, Dr. Theodore Felts. The doctor injected claimant's right shoulder with cortisone. And claimant continued working.

In early 2006 claimant returned to Dr. Felts, who referred claimant to Dr. Robert M. Drisko, II. After an MRI revealed a right torn rotator cuff, Dr. Drisko recommended surgery. Claimant then went to respondent and reported that he had severe shoulder pain that he related to work. Claimant spoke with Thomas Steck, who handled respondent's work injuries. At his April 2006 deposition, when claimant's memory regarding his shoulder symptoms should have been relatively fresh, claimant testified he attributed his shoulder symptoms to his work when he spoke with Mr. Steck in January 2006. Claimant testified, in part:

Q. (Mr. Stubbs) When is the first time you told anybody at Deffenbaugh [respondent] that you had shoulder problems that you attributed to your work?

A. (Claimant) I told Tom Steck in January of this year.

. . . .

Q. So at some point in January of 2006 you went to Mr. Steck, what did you tell him?

A. That I had severe shoulder pain and I thought it was work related and he did not think so, he said I needed to go see my family physician and I went and seen my family physician.

Q. So in this conversation with Mr. Steck you told him that you had shoulder pain and that you attributed it to your work, is that your testimony?

A. Yes, sir.

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[4] *Id.* at 16, 17.

[5] *Id.* at 21.

> Q. In this conversation did you tell him about any other potential causes or any other accidents that you attributed the shoulder pain to?
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> A. I made a statement about the accident and he said, "Well, it has been two years. You shouldn't be having any problems after two years."
>
> Q. What accident two years ago?
>
> A. The one in September of '04.
>
> Q. Are you attributing your shoulder problems to the September of 2004 accident?
>
> A. No, I am attributing my shoulder problems to all of the wear and tear I have pushed on steel doors.
>
> . . . .
>
> Q. (By Mr. Stubbs) Is that what you are saying is Steck attributed your shoulder problems to the '04 accident?
>
> A. He thought it might have been from the '04 accident.[6]

But at the August 2008 regular hearing, claimant testified somewhat differently. Claimant testified at that hearing that when he spoke with Mr. Steck about his shoulder symptoms in January 2006, he (claimant) believed his symptoms were related to a 2001 roll-over accident, but he was not certain.[7] Claimant further acknowledged that he did not relate the opening and closing of the container doors to his shoulder symptoms in that conversation.

The record indicates claimant was in two roll-over accidents while working for respondent – one in 2001 and the other in 2004. But there is no evidence that claimant injured his shoulders or received medical treatment for his shoulders following either accident.

Mr. Steck acknowledged talking with claimant in January 2006 about claimant's shoulder symptoms. But Mr. Steck testified claimant believed those problems were related to one of his earlier roll-over accidents. When Mr. Steck contacted respondent's workers compensation adjustor and was advised the claim for the 2001 roll-over accident had been closed, he telephoned claimant to advise the request for workers compensation benefits for his shoulders had been denied.

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[6] *Id.* at 17-19.

[7] R.H. Trans. at 19.

> Q. (Mr. Martin) And so they said they couldn't do anything under workers' compensation; is that correct?
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> A. (Mr. Steck) Yes. I called Shirley [respondent's workers compensation adjustor] to ask her about the claim, that Wayne [claimant] related it back to that. That's all he could think it related to because he couldn't think of anything else that could have been work related, so I called her and she looked it up and said the last thing medical paid or treatment was August of '01 and that the statute would have ran out in August of '03, so she said that case is closed and we can't reopen it.[8]

After respondent denied claimant's request for shoulder treatment, claimant proceeded with the right shoulder surgery that Dr. Drisko had recommended. Claimant worked through February 2, 2006, and the shoulder surgery was performed the next day.

After recuperating from surgery, claimant returned to work for respondent and, as indicated above, continues to perform his driving job in the roll-off department. Claimant's testimony is uncontradicted that Dr. Drisko has also recommended left shoulder surgery.

By the time of his April 2006 deposition, claimant was attributing his shoulder problems to his work and, more particularly, the opening and closing of the container doors. The record does not indicate when claimant reached that conclusion.

On February 28, 2006, claimant's application for hearing (Form K-WC E-1) was received by the Division of Workers Compensation. That form indicated claimant was alleging he injured both shoulders working for respondent due to the repetitive use of his upper extremities. The form indicated claimant sustained "[r]epetitive traume *[sic]* to 2/3/06."

In July 2006 Dr. Edward J. Prostic, who is a board-certified orthopedic surgeon, examined claimant at his attorney's request. The doctor concluded claimant had injured his right shoulder and had torn his rotator cuff but that claimant's right shoulder had been improved by the subacromial decompression and rotator cuff repair surgery performed by Dr. Drisko. Moreover, Dr. Prostic concluded the injury had been caused from repetitiously opening and closing heavy doors on claimant's trucks.

Because claimant failed to inform Dr. Prostic about ongoing left shoulder symptoms during the July 2006 examination, the doctor did not evaluate that shoulder. Accordingly, claimant returned to the doctor in August 2006 for another examination. This time Dr. Prostic examined the left shoulder and found mild tenderness, restricted range of motion, and weakness in that shoulder. Left shoulder x-rays showed demineralization of

[8] Steck Depo. at 38.

the greater tuberosity. Dr. Prostic diagnosed rotator cuff disease in the left shoulder caused by the pushing and pulling of the heavy metal doors during the course of claimant's employment.

Using the AMA *Guides*,[9] Dr. Prostic rated claimant as having a 16 percent impairment in the right upper extremity and an 8 percent impairment in the left upper extremity.

Dr. Lowry Jones, Jr., who is also a board-certified orthopedic surgeon, examined claimant in February 2007 at the Judge's request. But the Judge requested the doctor to refrain from providing an opinion regarding causation. Consequently, the doctor did not seek a detailed history during his examination of claimant regarding the cause of claimant's shoulder problems. Nonetheless, the doctor understood claimant's primary complaint was from pulling the doors of his truck up and down. According to Dr. Jones, claimant's medical records indicated the source of his shoulder injuries was from repetitive overhead activity. Dr. Jones testified, in part:

> Yes. Routinely, rotator cuff tears of the nature that was described by Dr. Drisko that he found is a repetitive overhead activity. It can be caused by a single-pulling activity, like pulling a cord or reaching out and pulling on an object. That certainly -- we know that that mechanism can cause a rotator cuff tear, but that wasn't what he said.
>
> He specifically said there wasn't an identifiable trauma, that it was just repetitive activity; and that would indicate -- would suggest overhead -- repetitive overhead activity.[10]

In addition, Dr. Jones testified claimant's rotator cuff tear could have developed from the natural aging process. But the doctor also testified that if claimant had an underlying degenerative progressive tear the pushing and pulling on the heavy doors in claimant's work "could certainly aggravate [the condition] terribly."[11] And by the end of his deposition, during which the doctor was asked to assume various facts about claimant's job, Dr. Jones concluded claimant's work was competent to either cause or aggravate the tear in his right shoulder and cause the symptoms in his left shoulder.

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[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[10] Jones Depo. at 8.

[11] *Id.* at 9.

Q. (Mr. Martin) Now, based on the information that you got from Mr. Cornwell, based on the questions that Mr. Stubbs asked you, and taking into consideration what the claimant told you when he was here, were the activities of his job, as you now understand them, a sufficient competent cause to either cause or aggravate that condition to, first of all, tear -- cause that small tear in the rotator cuff on the right?

A. (Dr. Jones) Yes.

Q. Was it sufficient to cause the symptoms he has in his left shoulder?

A. Yes.

MR. STUBBS: Was the original question could or did?

MR. MARTIN: Did. I think it was "did."

THE WITNESS: You said "could."

MR. MARTIN: Okay.

Q. (By Mr. Martin) Well, in that case, do you have an opinion if it did?

A. I suspect he had a significant underlying disease process that was aggravated -- and you used those words -- aggravated by the activity he did at work, which is very common. I suspect that it was possibly not the primary cause of it.

Q. But at least it aggravated and/or contributed to the ultimate injury?

A. Yes.

Q. And the need for treatment?

A. Yes.[12]

Dr. Jones determined claimant had a 10 percent impairment to the right upper extremity and a 5 percent impairment to the left upper extremity under the *Guides*. But the doctor did not recommend any permanent restrictions.

[12] *Id.* at 16, 17.

Did claimant injure his shoulders as the result of repetitive trauma he sustained that arose out of and in the course of his employment with respondent?

The Board affirms the Judge's finding that claimant injured his shoulders working for respondent. The Board finds it is more probably true than not that the forceful pushing and pulling that claimant performed opening and closing the heavy container doors injured his shoulders.

What is the date of accident for the series of repetitive traumas claimant sustained to his shoulders?

Because claimant's bilateral shoulder injuries occurred from a series of repetitive traumas, the date of accident is determined by K.S.A. 2005 Supp. 44-508(d), which provides:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

The date of accident for claimant's bilateral shoulder injuries under K.S.A. 2005 Supp. 44-508(d) is February 28, 2006, when claimant filed his application for hearing with the Division of Workers Compensation, as that is the date that claimant is deemed to have given respondent written notice of his accidental injuries. The Board rejects claimant's argument that Dr. Drisko became his *authorized* physician because respondent had failed to provide him medical treatment.

It is true respondent is responsible for Dr. Drisko's medical bills under K.S.A. 44-510j(h), which provides, in part:

> If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

But K.S.A. 44-510j does not transform Dr. Drisko into an *authorized* physician for purposes of K.S.A. 2005 Supp. 44-508(d). There is no language in either statute that so provides. And the Board would be required to go beyond the language of the Workers Compensation Act to reach such a conclusion. The Board, however, must follow the language of the Workers Compensation Act. In *Casco*,[13] the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[14]

In short, the Board rejects respondent's argument that any accidental injury claimant sustained was either in 2002 or 2005, as the facts do not establish that any of the criteria set forth in K.S.A. 2005 Supp. 44-508(d) occurred at that time. Furthermore, there appears to be no apparent reason to carve claimant's period of injury into smaller pieces.

Did claimant provide respondent with timely notice of his accident or injuries as required by K.S.A. 44-520?

The Act requires notice to be given within 10 days of the accident unless there is just cause, which extends the notice period to 75 days. K.S.A. 44-520 provides:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date

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[13] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[14] *Id.* at Syl. ¶ 6.

> of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Injuries from repetitive traumas occur over a period of time. Selecting just one date as the accident date for such injuries is a legal fiction. As indicated above, the date of accident for these bilateral shoulder injuries is February 28, 2006, when claimant is deemed to have served written notice on respondent by reason of the application for hearing. As the date of accident and date of notice are the same, notice was timely. In addition, the Board finds claimant's testimony is persuasive that he notified respondent in January 2006 that his shoulders were hurting from his work. The Board finds that claimant provided respondent sufficient information to satisfy the notice requirement at that time.

In summary, the Board finds claimant injured his shoulders working for respondent, that the appropriate date of accident for these repetitive use injuries was February 28, 2006, and that claimant provided respondent with timely notice of his bilateral shoulder injuries.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[15] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the October 29, 2008, Award entered by Judge Howard to change the date of accident. For the reasons above, the remainder of the Award is affirmed.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

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[15] K.S.A. 2008 Supp. 44-555c(k).

Respondent and its insurance carrier filed their application for review in this appeal under Docket Nos. 1,027,685 and 1,028,442. As it appears the appeal under Docket No. 1,028,442 was made in error, the Board dismisses that appeal.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge